



LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 2011-3 CRB Phonorecords II]

Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges are publishing final regulations setting the rates and terms for the section 115 statutory license for the use of musical works in physical phonorecord deliveries, permanent digital downloads, ringtones, interactive streaming, limited downloads, limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services.

DATES: *Effective:* January 1, 2014.

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SUPPLEMENTARY INFORMATION:

Background

Section 115 of the Copyright Act, title 17 of the United States Code, also known as the mechanical compulsory license, requires a copyright owner of a nondramatic musical work to grant a license to any person who wants to make and distribute phonorecords of that work, including digital phonorecord deliveries,¹ provided that the

¹ The Digital Performance Right in Sound Recordings Act, Public Law 104-39, 109 Stat. 336 (1995), extended the mechanical license to digital phonorecord deliveries. Consequently, the license covers digital transmissions of phonorecords in addition to the physical copies such as compact discs, vinyl and cassette tapes.

copyright owner has allowed phonorecords of the work to be produced and distributed to the public, and that the licensee complies with the statute and attendant regulations. 17 U.S.C. 115(a).

The Copyright Act requires the Copyright Royalty Judges (Judges) to conduct proceedings every five years to determine the rates and terms for the section 115 license. 17 U.S.C. 801(b)(1) and 804(b)(4).² Thus, the Judges, in accordance with 17 U.S.C. 804(b)(4), published a notice in the **Federal Register** commencing the current proceeding to set rates and terms for the section 115 license and requesting interested parties to submit their petitions to participate. 76 FR 590 (Jan. 5, 2011). In response to the notice, the Judges received 24 petitions to participate.³ The Judges set the timetable for the three-month negotiation period, *see* 17 U.S.C. 803(b)(3), as well as a deadline of April 30, 2012, for the participants' submission of written direct statements. On April 11, 2012, the Judges received a Motion to Adopt Settlement stating that "[a]ll participants in the Proceeding are parties to the Settlement or have reviewed the Settlement and do not object to its being adopted as the basis for setting statutory rates and terms."⁴ Motion to Adopt Settlement, at 2 (Apr. 11, 2012).

² The Judges commenced a proceeding in 2006, as directed by section 804(b)(4) of the Copyright Act, and published their final determination in the **Federal Register** on January 26, 2009. 74 FR 4510. Therefore, commencement of the next proceeding—the current proceeding—was to occur in January 2011. 17 U.S.C. 804(b)(4).

³ A complete list of parties submitting petitions to participate can be found at 77 FR 29261 (May 17, 2012). The Judges also received one filing styled as a "Comment in Response to Request for Petitions to Participate," which subsequently was withdrawn. *See* 77 FR at 29261 n.3.

⁴ The Settling Parties are comprised of National Music Publishers' Association, Inc.; the Songwriters Guild of America; the Nashville Songwriters Association International; the Church Music Publishers Association; the Recording Industry Association of America; Digital Media Association; and CTIA-the Wireless Association. One participant's signature was omitted inadvertently from the motion and subsequently provided on April 18, 2012. *See* 77 FR 29260 n.4. Although two participants did not sign the motion, the

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided they are submitted to the Judges for approval. This section provides in part that the Judges must provide to both non-participants and participants to the rate proceeding who “would be bound by the terms, rates, or other determination set by any agreement * * * an opportunity to comment on the agreement.” 17 U.S.C. 801(b)(7)(A)(i). Participants to the proceeding may also “object to [the agreement’s] adoption as a basis for statutory terms and rates.” *Id.*

The Judges “may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement,” only “if any participant [to the proceeding] objects to the agreement and the [Judges] conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.” 17 U.S.C. 801(b)(7)(A)(ii). Accordingly, on May 17, 2012, the Judges published a notice requesting comment on the proposed rates and terms, with certain modifications, submitted to the Judges.⁵

The Judges received two comments in response to the May 17 notice—one from the Settling Parties and the other from Gear Publishing Company (Gear), a non-participant. On November 20, 2012, five months after the deadline, the Judges received a third comment from Robert Clarida, also a non-participant, supporting the objections

Judges presume that they each reviewed the settlement and harbored no objection to its adoption, per the signatories’ representation. *Id.*

⁵ The Judges questioned whether the adoption of two accounting provisions, found in proposed § 385.12(e) and § 385.22(d), would encroach on the Register of Copyrights’ (Register) exclusive jurisdiction to promulgate regulations governing the statements of account to be submitted under section 115 of the Copyright Act. *See* 77 FR 29259, 29260-61 (May 17, 2012). This issue is discussed *infra*.

lodged by Gear in its June comments.⁶ The Settling Parties supported adoption of the settlement, suggested correction of certain non-substantive errors and raised certain stylistic issues with regard to the proposed regulatory text.⁷ Gear's objections were primarily policy-based concerns about the appropriate scope of the compulsory license. *See, e.g.*, Comments of Gear Publishing Company, at 2 ("it is inappropriate to offer interactive streaming and limited download rights via compulsory license until there is sufficient evidence to demonstrate that these uses will provide long term sustainable revenue * **.") and 4 ("promotional consideration" should not be allowed under a compulsory license). Mr. Clarida's comments, which were submitted at Gear's request, *see* Clarida Comments at 2, challenged the compatibility of the proposed rates and terms with the section 115 license. *See, e.g.*, Clarida Comments at 3-4 (promotional royalty rate of zero proposed in § 385.14 violates section 115 of the Copyright Act).

Section 801(b)(7)(A)(ii) limits the Judges' ability to reject an agreement on the reasonableness of the rates and terms published for comment. The Judges may decline to adopt an agreement as a basis for statutory terms and rates for participants that are not parties to the agreement if a participant that would be bound by the agreement objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates. *Id.* Neither Gear nor Mr. Clarida qualifies as a participant to this proceeding, as neither submitted a petition to participate. Therefore, the Judges cannot consider any objections lodged by them, as non-participants, regarding

⁶ On March 12, 2013, the Judges received a letter from the Settling Parties, which in part, urged that Mr. Clarida's comments not be considered due to the untimeliness of the submission. The Settling Parties' request is noted; the Judges decide, however, to consider Mr. Clarida's comments to address his contention that certain provisions are contrary to the statute.

⁷ The Judges have corrected the non-substantive errors and addressed the stylistic issues in regard to the regulatory text identified by the Settling Parties in Exhibit A to their comment.

the reasonableness of the rates and terms. *See Determination of Reasonable Rates and Terms for Noncommercial Broadcasting, Final rule*, Docket No. 2011-2 CRB NCEB II, 77 FR 71104, 71107 (Nov. 29, 2012); *see also, Review of Copyright Royalty Judges Determination, Notice; correction*, Docket No. 2009-1, 74 FR 4537, 4540 (Jan. 26, 2009) (Judges able to review reasonableness of terms and rates contained in agreement only if a participant to the proceeding objects to the agreement).

The Judges may, however, “declin[e] to adopt other portions of an agreement that would be contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law.” 74 FR at 4540. Mr. Clarida’s comments assert that certain of the proposed rules violate the section 115 statutory license. His assertions will be addressed below.

Referral of Material Questions to the Register of Copyrights

Section 802(f)(1)(A)(ii) of the Copyright Act, in pertinent part, authorizes one or more of the Judges to request from the Register “an interpretation of any material questions of substantive law that relate to the construction of provisions of this title and arise in the course of the proceeding.” Any request for a written interpretation must be in writing and on the record, and participants to the proceeding must be given an opportunity to comment on the question(s) referred. *Id.*

On March 27, 2013, the Chief Copyright Royalty Judge issued an order referring material questions of law to the Register concerning the Judges’ authority to adopt certain terms in the Settling Parties’ Proposed Settlement relating to statements of account. *See Order Referring Material Questions of Law and Setting Briefing Schedule*, Docket No. 2011-3 CRB Phonorecords II (Mar. 27, 2013). The proposed terms involved the

accounting provisions proposed in 37 CFR 385.12(e) and 385.22(d) and the confidentiality provisions proposed in 37 CFR 385.12(f) and 385.22(e).⁸ *Id.* at 3. The Register delivered her decision to the Judges on May 1, 2013, and published it in the **Federal Register** on May 16, 2013. 78 FR 28770.

Proposed Accounting Provisions

The Register found that the accounting provisions proposed in §§ 385.12(e) and 385.22(d)⁹ “represent an encroachment on the Register’s [exclusive] authority” regarding statements of account even though the proposed provisions are consistent with the Register’s current regulations. *Id.* at 28772. In light of the Register’s interpretation, the Judges cannot adopt proposed §§ 385.12(e) and 385.22(d). Nevertheless, the Judges recognize the parties’ efforts to reach an agreement and the importance of these provisions to the agreement. *See* Letter from Settling Parties to Copyright Royalty Judges (June 7, 2013) (on file with the Copyright Royalty Board) (proposed provisions “reflect an industry-wide consensus on necessary detail requirements as part of the accounting process for the proposed percentage rates” and represent an “important factor in reaching a settlement” in this proceeding). Therefore, the Judges recommend that the Register include these provisions in the amendments to the regulations regarding statements of account currently being considered in the Copyright Office’s ongoing

⁸ The Order directed participants to submit an initial brief no later than April 5, 2013, and to submit reply briefs no later than April 12, 2013. The lone brief, submitted by the Settling Parties, was transmitted to the Register on April 17, 2013.

⁹ Proposed § 385.12(e) would have required the licensee’s statement of account to “set forth each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the licensee determined the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a minimum royalty or subscriber-based royalty floor pursuant to § 385.13 does or does not apply) and, for each offering reported, also indicate the type of licensed activity involved and the number of plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.” 77 FR at 29267 (May 17, 2012). The language of proposed § 385.22(d) mirrors that in § 385.12(e), except for non-substantive conforming language needed for its inclusion in proposed Subpart C.

rulemaking. See *Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License*, Docket No. RF 2008-1, 73 FR 48396, 48398 (Aug. 19, 2008) (the Judges may recommend that the Register “amend the regulations governing statements of account to include additional information.”).

Proposed Confidentiality Provisions

Conversely, the Register found that the confidentiality provisions proposed at §§ 385.12(f) and 385.22(e)¹⁰ do not “encroach upon the Register’s authority with respect to statements of account” nor do they “conflict with any other authority reserved for the Register.” 78 FR at 28773. The Register questioned, however, whether the Judges “have any independent authority to issue regulations such as the proposed confidentiality [provisions] which would impose obligations on a copyright owner with regard to what he or she is able to do with a statement of account received by a licensee.” *Id.* Consequently, the Register highlighted another potential novel question of law: the question of the Judges’ authority regarding “imposing requirements on what a *copyright owner* (as opposed to a licensee) may do (or not do) with information provided in a

¹⁰ The confidentiality provisions proposed in §§ 385.12(f) and 385.22(e) would mandate: “A licensee’s statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall be maintained in confidence by any copyright owner, authorized representative or agent that receives it, and shall solely be used by the copyright owner, authorized representative or agent for purposes of reviewing the amounts paid by the licensee and verifying the accuracy of any such payments, and only those employees of the copyright owner, authorized representative or agent who need to have access to such information for such purposes will be given access to such information; provided that in no event shall access be granted to any individual who, on behalf of a record company, is directly involved in negotiating or approving royalty rates in transactions authorizing third party services to undertake licensed activity with respect to sound recordings. A licensee’s statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall not be used for any other purpose, and shall not be disclosed to or used by or for any record company affiliate or any third party, including any third-party record company.” 77 FR at 29262, 29267-68.

statement of account after that statement was prepared and served in accordance with the [Copyright] Office’s regulations.” *Id. (emphasis in original)*.

Referral of Novel Question to the Register of Copyrights

Accordingly, on May 17, 2013, the Judges referred to the Register the novel question of “whether the [Judges] have the authority to impose a confidentiality requirement such as that proposed in §§ 385.12(f) and 385.22(e).” *See Order Referring Novel Question of Law and Setting Briefing Schedule*, Docket No. 2011-3 CRB Phonorecords II, at 4.¹¹ The Register delivered her decision to the Judges on July 25, 2013, and published it in the **Federal Register** on August 5, 2013. 78 FR 47421.

The Register concluded that the Judges are without authority to “adopt the provisions imposing a duty of confidentiality upon copyright owners, regardless of whether the provisions are included in a voluntarily negotiated license agreement between copyright owners and licensees.” *Scope of the Copyright Royalty Judges’ Authority to Adopt Confidentiality Requirements upon Copyright Owners within a Voluntarily Negotiated License Agreement, Final Order*, Docket No. 2011-3 CRB, 78 FR at 47423. The Register noted that section 115(c)(3)(D) of the Copyright Act grants to the Judges the authority to establish “notice and recordkeeping requirements under which such records of use shall be kept and made available *by licensees*” but not to those to “be kept and made available *by copyright owners*.” *Id. (emphasis in original)*. Moreover, she found that “such provisions are not necessary to effectively implement the [section

¹¹ The Order directed participants to submit an initial brief no later than June 7, 2013, and to submit reply briefs no later than June 21, 2013. The lone brief, submitted by the Settling Parties, was transmitted to the Register on June 25, 2013. The Settling Parties also submitted a letter requesting that the Judges recommend to the Register that the language in the accounting provisions proposed in §§ 385.12(e) and 385.22(d) be incorporated into the Copyright Office’s regulations governing statements of account. The Judges transmitted the letter to the Register. As discussed *supra*, the Judges have made the requested recommendation.

115] statutory license or to insure the smooth administration of the [section 115] license.”

Id. In light of the Register’s interpretation, the Judges cannot adopt the confidentiality requirements in §§ 385.12(f) and 385.22(e) of the proposed settlement.

Having addressed the Register’s concerns with the proposed settlement, the Judges now turn to the concerns raised by Mr. Clarida.

Comments of Mr. Clarida

When presented with a settlement agreement, the Judges’ task is to implement the settlement to the extent possible as long as no provision on its face violates the statutory license at issue. *See* 17 U.S.C. 801(b)(7)(A); *see also* H.R. Rep. No. 108-408, at 24 (2004) (purpose of provision to facilitate and promote settlements). With this statutory task in mind, the Judges consider Mr. Clarida’s challenge to the legal validity of the promotional “free trial” royalty rates (proposed §§ 385.14(b)(1), 385.21, and 385.24), and Subpart C activities (i.e., “Limited Offerings, Mixed Service Bundles, Paid Locker Services, and Purchased Content Locker Services”) (proposed §§ 385.20-24).¹²

Mr. Clarida’s Concerns Regarding Promotional and “Free Trial” Royalty Rates

Mr. Clarida argues that the promotional royalty rate of zero in proposed § 385.14(b)(1) violates section 115 of the Copyright Act, which, according to Mr. Clarida,

¹² Mr. Clarida also challenges the legal validity of the confidentiality provisions (proposed §§ 385.12(f), 385.22(e)). The Register’s determination that the Judges have no authority to impose an obligation of confidentiality on a copyright owner with respect to a statement of account renders Mr. Clarida’s arguments on this point moot.

Moreover, at the outset of his comments, Mr. Clarida makes a vague, passing challenge to the Proposed Rule on the basis that “the proposed changes, if adopted, would risk placing the United States in violation of Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). *Clarida Comments*, at 2. Congress was clear, however, that TRIPS may not be used as a basis for challenging any action of a federal agency and that, to the extent any conflict exists between TRIPS and U.S. law, U.S. law governs. The Uruguay Round Agreements Act, Pub. L. 103-465, sections 102(a)(1), (c)(1)(B), 108 Stat. 4809 (1994). The Judges, therefore, will be guided by the provisions of the Copyright Act and will not consider any objections based on TRIPS.

requires that every phonorecord made and distributed under the license be subject to a royalty. Clarida Comments, at 3-4. He contends that “[z]ero is not a royalty; it is an exemption,” and only Congress possesses the authority to create statutory exemptions under the Copyright Act. *Id.* at 4. The Judges’ adoption of a royalty rate of zero, Mr. Clarida charges, would result in the creation of “a new statutory exemption in the guise of a regulation.” *Id.* at 4-5.

Mr. Clarida also alleges legal infirmities with the “free trial royalty rate of zero” defined in proposed § 385.21¹³ and applied in proposed § 385.24. Proposed § 385.24, in his view, allows a record company, rather than the owner of a musical work, to permit use of that label’s sound recordings *gratis* to “promote the offering” of a limited offering service, mixed service bundle, or paid locker service. *Id.* at 5. Mr. Clarida contends that this provision “does not even credibly further the statutory purpose of encouraging the sales of musical works.” *Id.* He posits that proposed § 385.24 conceivably elevates technology companies and record companies to the status of joint copyright owners of the musical works, instead of mere licensees, thereby allowing licensees “to usurp the copyright owner’s exclusive rights with respect to works beyond the licensee’s own phonorecords” in violation of section 115 of the Copyright Act. *Id.* 5-6 (*footnote omitted*).

Mr. Clarida interprets section 115(c)(4) of the Copyright Act as requiring that even where distribution of a phonorecord is by rental, lease, or lending, the royalty must be calculated “based on revenue generated ‘from every such act’ of distribution of the phonorecord under this clause.” *Id.* at 6 (*emphasis omitted*). He concludes that “the

¹³ Proposed § 385.21 defines “free trial royalty rate” as “the statutory royalty rate of zero in the case of certain free trial periods, as provided in § 385.24.”

[proposed free trial royalty rate] does away with this required nexus between the distribution of specific phonorecords and the calculation of payment, allowing for extensive royalty-free use by compulsory licensees.” *Id.* (footnote omitted).

Judges’ Response

The Judges find Mr. Clarida’s challenges unavailing. A royalty rate of zero set for a statutory license, while not common, is not unprecedented under the Copyright Act. Indeed, in 2009 the Judges adopted the promotional royalty rate in § 385.14 challenged here by Mr. Clarida. The Register reviewed the Judges’ adoption of the zero rate, which is still in effect, and found no legal error in such action.¹⁴ *See Review of Copyright Royalty Judges Determination, Notice; correction*, Docket No. 2009-1, 74 FR 4537 (Jan. 26, 2009). *See also Rate Adjustment for the Satellite Carrier Compulsory License, Final rule and order*, Docket No. 96-3 CARP SRA, 62 FR 55742, 55753 (Oct. 28, 1997) (the Librarian of Congress upheld the imposition by a Copyright Arbitration Royalty Panel of a zero royalty rate for the retransmission of certain distant signals by satellite carriers under the section 119 statutory license and accepted the Register’s recommendation to adopt a zero royalty rate for certain local retransmissions of network signals.).

The Judges also disagree with Mr. Clarida’s assertion that other provisions of the Copyright Act, which create exceptions to the payment of royalties in other contexts, imply that the Judges cannot approve a settlement and adopt regulations in which a royalty rate of zero is established for certain promotions or trial periods under section 115

¹⁴ The Register suggested, in issuing an interim rule clarifying the definition of a “digital phonorecord delivery,” that a zero rate may be appropriate in certain circumstances. *See Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Interim rule and request for comments*, Docket No. RM 2000-7, 73 FR 66173, 66181 (Nov. 7, 2008)(“[T]he Office would not dispute a finding that non-interactive and interactive streams have different economic value, or even that a rate of zero might be appropriate for [digital phonorecord deliveries] made in the course of non-interactive streams.”).

of the Copyright Act. The fact that by granting exceptions Congress has determined, in effect, that in certain circumstances a royalty rate of zero must *always* apply does not imply that in all other circumstances a royalty rate of zero may *never* apply. Any mandatory statutory waiver of the payment of royalties in other contexts cannot serve to prohibit the Judges, in the exercise of their discretion, from incorporating into the regulations the terms of a settlement in which a zero royalty rate is established.¹⁵

Accordingly, the Judges conclude that nothing in the Copyright Act indicates that adoption of a zero royalty rate is contrary to section 115 of the Copyright Act; and the Judges adopt, as published on May 17, 2012, the provisions relating to the promotional and “free trial” royalty rates.

Mr. Clarida’s Concerns Regarding Subpart C Activities

Mr. Clarida charges that the use of the statutory license under section 115 of the Copyright Act by “entirely new classes of ‘bundled’ activity: so-called mixed service bundles, music bundles, paid locker services, and purchased content locker services” violates the primary-purpose requirement of section 115(a), which states “[a] person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.” Clarida Comments at 7. Such bundling, he concludes, results in “an impermissible expansion of the scope” of the section 115 license because many of the services in such bundles “have nothing whatsoever to do with distributing phonorecords,

¹⁵ As noted *supra*, a “participant” in this proceeding could have objected to the reasonableness of the rates and terms of the settlement and the proposed regulations. If a “participant” had raised such objections, the Judges would have considered those arguments, including any arguments as to any alleged failure of the zero royalty rates, combined with the associated promotional benefits, to provide reasonable economic compensation to a copyright owner under section 115 of the Copyright Act. However, Mr. Clarida and Gear chose not to participate and therefore they cannot make any cognizable argument as to the reasonableness of the combination of the proposed zero royalty rates and the associated promotional benefits.

and the services in their respective entirety are relieved of the statutory obligation to pay royalties based on specific individual music transactions.” *Id.*

The Judges do not agree with Mr. Clarida’s assertion that the “primary purpose” of the providers of the new classes of “bundled” activity is not to make phonorecords and distribute them to the public for private use. The fact that other services are bundled with that service does not cause any one of the bundled services to have primacy over any other of the bundled services. In that regard, Mr. Clarida does not propose a method by which the Judges could rank the “purposes” of the several bundled services.

Mr. Clarida also opposes the calculation of royalties proposed in § 385.20(a), which would allow music bundle providers the option of paying for the “components” under the rates set forth in Subpart A of the proposed regulations or under the formula set forth in Subpart C of the proposal and would relieve those who distribute such bundles from paying for each phonorecord made or distributed. Clarida Comments at 7. Mr. Clarida also opposes the calculation of royalties under proposed § 385.22 for the other proposed Subpart C activities, asserting that such calculation “is utterly without support in the statute.” *Id.* In particular, Mr. Clarida objects to the portion of the proposed royalty formula that would allow, for instance, mixed service bundles and locker services to determine a “constructive number of plays,” even though the actual number of uses are known, and then apply that number against “a formula apportioning aggregate revenue from the service.” *Id.* The main problem with this approach, in his view, is that information regarding the number of plays is not simply reported and paid for accordingly. *Id.*

Judges’ Response

Despite Mr. Clarida’s objections, none of the challenged Subpart C provisions on their face appear to be contrary to the section 115 license. As Mr. Clarida acknowledges, under the proposed regulations, the copyright owners would receive royalties for the musical works bundled with the other services. Mr. Clarida therefore is objecting to the “reasonableness” of those rates. As noted *supra*, since he and Gear were not “participants” to this proceeding, they cannot challenge the reasonableness of the rates and terms of the settlement.

Therefore, the Judges adopt the settlement as proposed with the exception of the provisions that the Register found to be contrary to law.

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

Final Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges amend Part 385 of Chapter III of title 37 of the Code of Federal Regulations as follows:

PART 385 – RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

1. The authority citation for part 385 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

§ 385.4 [Amended]

2. Section 385.4 is amended by removing “(201.19(e)(7)(i))” and adding “§ 201.19(e)(7)(i)” in its place.
3. Revise the heading of Subpart B to read as follows:

Subpart B – Interactive Streaming and Limited Downloads

4. Section 385.10 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 385.10 General.

* * * * *

(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.

(c) *Interpretation.* This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. 115, must be obtained.

5. Section 385.11 is amended as follows:

a. By adding in alphabetical order definitions for “Affiliate”, “Applicable consideration”, and “GAAP”;

b. In paragraphs (1) and (2) of the definition of “Limited download”, by adding “provider” after “service”;

- c. In the definition of “Offering”, by removing “service’s” and adding “service provider’s” in its place, and by adding “provider” after “service”;
- d. By removing the definition of “Publication date”;
- e. In the definition of “Relevant page”, by adding “provider” after “service” in the first sentence and by removing “users for limited downloads or interactive streams” and adding “users for licensed activity” in its place in the second sentence;
- f. By revising the term “Service”, to read “Service provider”;
- g. Amend the definition of “Service revenue” by:
 - i. In paragraph (1) introductory text, by removing “U.S. Generally Accepted Accounting Principles” and adding “GAAP” in its place;
 - ii. In paragraphs (1)(i) and (ii), by adding “provider” after “service”;
 - iii. In paragraph (1)(iii), by adding “provider” after “by the service”;
 - iv. In paragraph (2)(i), by removing “service” and adding “service provider” in its place each place it appears; and
- v. In paragraph (5) introductory text, by removing “In connection with such a bundle, if a record company providing sound recording rights to the service” and by removing paragraphs (5)(i) and (ii).

The additions read as follows:

§ 385.11 Definitions.

* * * * *

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a record company shall not include a copyright owner of musical works to the extent it is engaging in business as to musical works.

Applicable consideration means anything of value given for the identified rights to undertake the licensed activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether such consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the licensed activity but nevertheless provide consideration for the identified rights to undertake the licensed activity, and including any such value given to an affiliate of a record company for such rights to undertake the licensed activity. For the avoidance of doubt, value given to a copyright owner of musical works that is controlling, controlled by, or under common control with a record company for rights to undertake the licensed activity shall not be considered value given to the record company. Notwithstanding the foregoing, applicable consideration shall not include in-kind promotional consideration given to a record company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where such in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

GAAP means U.S. Generally Accepted Accounting Principles, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards, as

issued by the International Accounting Standards Board, or as accepted by the Securities and Exchange Commission if different from that issued by the International Accounting Standards Board, in lieu of Generally Accepted Accounting Principles, then an entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

* * * * *

6. Section 385.12 is amended as follows:

a. In paragraph (b) introductory text, by removing “offering.” and adding “offering taking into consideration service revenue and expenses associated with such offering.” in its place in the second sentence;

b. In paragraph (b)(1) introductory text, by removing “Service.” and adding “Offering.” in its place and by adding “provider” after “service”;

c. In paragraph (b)(1)(i), by removing “revenue as” and adding “revenue associated with the relevant offering as” in its place;

d. In paragraph (b)(2):

i. By removing “service, subtract” and adding “service provider, subtract” in its place in the first sentence;

ii. By removing “by the service” in the first sentence;

iii. By removing “While” and adding “Although” in its place in the second sentence;

iv. By removing “under its agreements with performing rights societies as defined in 17 U.S.C. 101” in the second sentence; and

v. By removing “In the latter case,” and adding “In the case where the service is also engaging in the public performance of musical works that does not constitute licensed activity,” in its place in the third sentence;

e. In paragraph (b)(3) introductory text, by removing “This is” and adding “The payable royalty pool is” in its place and by adding “provider” after “service”;

f. In paragraph (b)(4), by removing “used by the service” and adding “used by the service provider” in its place each place it appears, by removing “on or after October 1, 2010” in the fourth sentence, and by removing “if the service is” and adding “if the service provider is” in the fifth sentence;

g. By revising paragraph (c); and

h. In paragraph (d) introductory text, by removing “For licensed activity on or after October 1, 2010, for” and adding “For” in its place.

The revision reads as follows:

§ 385.12 Calculation of royalty payments in general.

* * * * *

(c) *Percentage of service revenue.* The percentage of service revenue applicable under paragraph (b) of this section is 10.5%.

* * * * *

7. Section 385.13 is amended as follows:

a. In paragraphs (a)(1) through (5), by removing “§ 385.12(b)(1)” and adding “§ 385.12(b)(1)(ii)” in its place each place it appears, and by removing “§ 385.12(b)(3)” and adding “§ 385.12(b)(3)(ii)” in its place each place it appears;

b. In paragraph (a)(4):

i. By adding “providing licensed activity that is” before “made available to end users” in the first sentence;

ii. By adding “(including products or services subject to other subparts)” before “as part of a single transaction” in the first sentence;

iii. By removing “subscription service separate” and adding “subscription service providing licensed activity separate” in its place in the first sentence; and

iv. By removing “subscription service for a single price” and adding “subscription service providing licensed activity for a single price” in its place in the first sentence;

c. By revising paragraphs (b) and (c);

d. By redesignating paragraph (d) as paragraph (e);

e. By adding a new paragraph (d); and

f. In newly redesignated paragraph (e):

i. By removing “the service shall for the relevant offering calculate its” and adding “the” in its place in the first sentence; and

ii. By adding “shall be calculated,” before “taking into account” in the first sentence.

The revisions and additions read as follows:

§ 385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.

* * * * *

(b) *Computation of subminimum I.* For purposes of paragraphs (a)(2), (3), and (4) of this section, subminimum I for an accounting period means the aggregate of the

following with respect to all sound recordings of musical works used in the relevant offering of the service provider during the accounting period—

(1) In cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, 17.36% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, 21% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(c) *Computation of subminimum II.* For purposes of paragraphs (a)(1) and (5) of this section, subminimum II for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service provider during the accounting period—

(1) In cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams and limited downloads of a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, 18% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, 22% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(d) *Payments made by third parties.* If a record company providing sound recording rights to the service provider for a licensed activity—

(1) Recognizes revenue (in accordance with GAAP, and including for the avoidance of doubt all applicable consideration with respect to such rights for the accounting period, regardless of the form or timing of payment) from a person or entity other than the service provider providing the licensed activity and its affiliates, and

(2) Such revenue is received, in the context of the transactions involved, as applicable consideration for such rights,

(3) Then such revenue shall be added to the amounts expensed by the service provider solely for purposes of paragraphs(b)(1), (b)(2), (c)(1), or (c)(2) of this section, as applicable, if not already included in such expensed amounts. Where the service provider is the licensee, if the service provider provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service provider hereunder as a result of revenue recognized from a person or entity other than the service provider as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service provider to calculate the additional royalties and indemnify the service provider for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.

* * * * *

8. Section 385.14 is amended as follows:

a. In paragraph (a)(1)(iii), by removing "service" and adding "service provider" in its place each place it appears;

b. In paragraph (a)(1)(iii)(A), by removing "commencing on or after October 1, 2010, except" and adding "other than" in its place;

c. In paragraph (a)(3):

- i. By removing “the service shall provide” and adding “the service provider shall provide” in its place in the first sentence;
- ii. By removing “the service shall have” and adding “the service provider shall have” in its place in the first sentence;
- iii. By removing “service does not provide” and adding “service provider does not provide” in its place in the second sentence; and
- iv. By removing “the service (but” and adding “the service provider (but” in its place in the second sentence;
- d. By revising paragraph (b)(1);
- e. In paragraph (b)(4), by removing “the service, and not” and adding “the service provider, and not” in its place in the second sentence; and
- f. By revising paragraph (d).

The revisions read as follows:

§ 385.14 Promotional royalty rate.

* * * *

(b) * * *

(1) No applicable consideration for making or authorizing the relevant interactive streams or limited downloads is received by the record company, any of its affiliates, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration given to a record company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings or the paid use of music services through which sound recordings are available;

* * * *

(d) *Interactive streaming of clips.* In addition to those in paragraph (a) of this section, the provisions of this paragraph (d) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate of segments of sound recordings of musical works with a playing time that does not exceed 90 seconds. Such interactive streams may be made or authorized by a record company under the promotional royalty rate without any of the temporal limitations set forth in paragraphs (b) and (c) of this section (but subject to the other conditions of paragraphs (b) and (c) of this section, as applicable). For clarity, this paragraph (d) is strictly limited to the uses described herein and shall not be construed as permitting the creation or use of an excerpt of a musical work in violation of 17 U.S.C. 106(2) or 115(a)(2) or any other right of a musical work owner.

9. Add Subpart C to read as follows:

Subpart C—Limited Offerings, Mixed Service Bundles, Music Bundles, Paid Locker Services and Purchased Content Locker Services

Sec.

385.20 General.

385.21 Definitions.

385.22 Calculation of royalty payments in general.

385.23 Royalty rates and subscriber-based royalty floors for specific types of services.

385.24 Free trial periods.

385.25 Reproduction and distribution rights covered.

385.26 Effect of rates.

Subpart C—Limited Offerings, Mixed Service Bundles, Music Bundles, Paid Locker Services and Purchased Content Locker Services

§ 385.20 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for certain reproductions or distributions of musical works through limited offerings, mixed service bundles, music bundles, paid locker services and purchased content locker services provided in accordance with the provisions of 17 U.S.C. 115. For the avoidance of doubt, to the extent that product configurations for which rates are specified in subpart A of this part are included within licensed subpart C activity, as defined in § 385.21, the rates specified in subpart A of this part shall not apply, except that in the case of a music bundle the compulsory licensee may elect to pay royalties for the music bundle pursuant to subpart C of this part or for the components of the bundle pursuant to subpart A of this part.

(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes reproduction or distribution of musical works in limited offerings, mixed service bundles, music bundles, paid locker services or purchased content locker services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.

(c) *Interpretation.* This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any

conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. 115, must be obtained.

§ 385.21 Definitions.

For purposes of this subpart, the following definitions shall apply:

Affiliate shall have the meaning given in § 385.11.

Applicable consideration shall have the meaning given in § 385.11, except that for purposes of this subpart C, references in the definition of “Applicable consideration” in § 385.11 to licensed activity shall mean licensed subpart C activity, as defined in this section.

Free trial royalty rate means the statutory royalty rate of zero in the case of certain free trial periods, as provided in § 385.24.

GAAP shall have the meaning given in § 385.11.

Interactive stream shall have the meaning given in § 385.11.

Licensee shall have the meaning given in § 385.11.

Licensed subpart C activity means, referring to subpart C of this part—

(1) In the case of a limited offering, the applicable interactive streams or limited downloads;

(2) In the case of a locker service, the applicable interactive streams, permanent digital downloads, restricted downloads or ringtones;

(3) In the case of a music bundle, the applicable reproduction or distribution of a physical phonorecord, permanent digital download or ringtone; and

(4) In the case of a mixed service bundle, the applicable—

- (i) Permanent digital downloads;
- (ii) Ringtones;
- (iii) To the extent a limited offering is included in a mixed service bundle, interactive streams or limited downloads; or
- (iv) To the extent a locker service is included in a mixed service bundle, interactive streams, permanent digital downloads, restricted downloads or ringtones.

Limited download shall have the meaning given in § 385.11.

Limited offering means a subscription service providing interactive streams or limited downloads where—

(1) An end user is not provided the opportunity to listen to a particular sound recording chosen by the end user at a time chosen by the end user (i.e., the service does not provide interactive streams of individual recordings that are on-demand, and any limited downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the end user over a period of time are substantially limited relative to services in the marketplace providing access to a comprehensive catalog of recordings (e.g., a service limited to a particular genre, or permitting interactive streaming only from a monthly playlist consisting of a limited set of recordings).

Locker service means a service providing access to sound recordings of musical works in the form of interactive streams, permanent digital downloads, restricted downloads or ringtones, where the service has reasonably determined that phonorecords of the applicable sound recordings have been purchased by the end user or are otherwise

in the possession of the end user prior to the end user's first request to access such sound recordings by means of the service. The term locker service does not extend to any part of a service otherwise meeting this definition as to which a license is not obtained for the applicable reproductions and distributions of musical works.

Mixed service bundle means an offering of one or more of permanent digital downloads, ringtones, locker services or limited offerings, together with one or more of non-music services (e.g., Internet access service, mobile phone service) or non-music products (e.g., a device such as a phone) of more than token value, that is provided to users as part of one transaction without pricing for the music services or music products separate from the whole offering.

Music bundle means an offering of two or more of physical phonorecords, permanent digital downloads or ringtones provided to users as part of one transaction (e.g., download plus ringtone, CD plus downloads). A music bundle must contain at least two different product configurations and cannot be combined with any other offering containing licensed activity under subpart B of this part or subpart C of this part.

(1) In the case of music bundles containing one or more physical phonorecords, the physical phonorecord component of the music bundle must be sold under a single catalog number, and the musical works embodied in the digital phonorecord delivery configurations in the music bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the music bundle contains a set of digital phonorecord deliveries sold by the same record company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), up to 5 sound recordings of musical works that are included in the stand-alone version of such set

of digital phonorecord deliveries but are not included on the physical phonorecord may be included among the digital phonorecord deliveries in the music bundle. In addition, the seller must permanently part with possession of the physical phonorecord or phonorecords sold as part of the music bundle.

(2) In the case of music bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the music bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Paid locker service means a locker service that is a subscription service.

Permanent digital download shall have the meaning given in § 385.2.

Purchased content locker service means a locker service made available to end-user purchasers of permanent digital downloads, ringtones or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the permanent digital downloads, ringtones or physical phonorecords, with respect to the sound recordings embodied in permanent digital downloads or ringtones or physical phonorecords purchased from a qualifying seller as described in paragraph (1) of this definition of “Purchased content locker service,” whereby the locker service enables the purchaser to engage in one or both of the qualifying activities identified in paragraph (2) of this definition of “Purchased content locker service.” In addition, in the case of a locker service made available to end-user purchasers of physical phonorecords, the seller must permanently part with possession of the physical phonorecords.

(1) A qualifying seller for purposes of this definition of “purchased content locker service” is the same entity operating such locker service, one of its affiliates or predecessors, or—

(i) In the case of permanent digital downloads or ringtones, a seller having another legitimate connection to the locker service provider set forth in one or more written agreements (including that the locker service and permanent digital downloads or ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords, a seller having an agreement with—

(A) The locker service provider whereby such parties establish an integrated offer that creates a consumer experience commensurate with having the same service both sell the physical phonorecord and offer the locker service; or

(B) A service provider that also has an agreement with the entity offering the locker service, where pursuant to those agreements the service provider has established an integrated offer that creates a consumer experience commensurate with having the same service both sell the physical phonorecord and offer the locker service.

(2) Qualifying activity for purposes of this definition of “purchased content locker service” is enabling the purchaser to—

(i) Receive one or more additional phonorecords of such purchased sound recordings of musical works in the form of permanent digital downloads or ringtones at the time of purchase, or

(ii) Subsequently access such purchased sound recordings of musical works in the form of interactive streams, additional permanent digital downloads, restricted downloads or ringtones.

Record company shall have the meaning given in § 385.11.

Restricted download means a digital phonorecord delivery distributed in the form of a download that may not be retained and played on a permanent basis. The term restricted download includes a limited download.

Ringtone shall have the meaning given in § 385.2.

Service provider shall have the meaning given in § 385.11, except that for purposes of this subpart references in the definition of “Service provider” in § 385.11 to licensed activity and service revenue shall mean licensed subpart C activity, as defined in this section, and subpart C service revenue, as defined in this section, respectively.

Subpart C offering means, referring to subpart C of this part, a service provider’s offering of licensed subpart C activity, as defined in this section, that is subject to a particular rate set forth in § 385.23(a) (e.g., a particular subscription plan available through the service provider).

Subpart C relevant page means, referring to subpart C of this part, a page (including a Web page, screen or display) from which licensed subpart C activity, as defined in this section, offered by a service provider is directly available to end users, but only where the offering of licensed subpart C activity, as defined in this section, and content that directly relates to the offering of licensed subpart C activity, as defined in this section, (e.g., an image of the artist or artwork closely associated with such offering, artist or album information, reviews of such offering, credits and music player controls) comprises 75% or more of the space on that page, excluding any space occupied by advertising. A licensed subpart C activity, as defined in this section, is directly available to end users from a page if sound recordings of musical works can be accessed by end

users for licensed subpart C activity, as defined in this section, from such page (in most cases this will be the page where the transmission takes place).

Subpart C service revenue. (1) Subject to paragraphs (2) through (6) of the definition of “Subpart C service revenue,” as defined in this section, and subject to GAAP, subpart C service revenue shall mean, referring to subpart C of this part, the following:

(i) All revenue recognized by the service provider from end users from the provision of licensed subpart C activity, as defined in this section;

(ii) All revenue recognized by the service provider by way of sponsorship and commissions as a result of the inclusion of third-party “in-stream” or “in-download” advertising as part of licensed subpart C activity, as defined in this section, (i.e., advertising placed immediately at the start, end or during the actual delivery, by way of transmissions of a musical work that constitute licensed subpart C activity, as defined in this section); and

(iii) All revenue recognized by the service provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a subpart C relevant page, as defined in this section, of the service or on any page that directly follows such subpart C relevant page, as defined in this section, leading up to and including the transmission of a musical work that constitutes licensed subpart C activity, as defined in this section; provided that, in the case where more than one service is actually available to end users from a subpart C relevant page, as defined in this section, any advertising revenue shall be allocated between such services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of “Subpart C service revenue,” of this section such revenue shall, for the avoidance of doubt,

(i) Include any such revenue recognized by the service provider, or if not recognized by the service provider, by any associate, affiliate, agent or representative of such service provider in lieu of its being recognized by the service provider;

(ii) Include the value of any barter or other nonmonetary consideration;

(iii) Not be reduced by credit card commissions or similar payment process charges; and

(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than refunds to end users for licensed subpart C activity, as defined in this section, that they were unable to use due to technical faults in the licensed subpart C activity, as defined in this section, or other bona fide refunds or credits issued to end users in the ordinary course of business.

(3) In each of the cases identified in paragraph (1) of the definition of “Subpart C service revenue” of this section, such revenue shall, for the avoidance of doubt, exclude revenue derived solely in connection with services and activities other than licensed subpart C activity, as defined in this section, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of the definition of “Subpart C service revenue” of this section. By way of example, the following kinds of revenue shall be excluded:

(i) Revenue derived from non-music voice, content and text services;

(ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions);

(iii) Revenue generated from the sale of actual locker service storage space to the extent that such storage space is sold at a separate retail price;

(iv) In the case of a locker service, revenue derived from the sale of permanent digital downloads or ringtones; and

(v) Revenue derived from other music or music-related products and services that are not or do not include licensed subpart C activity, as defined in this section.

(4) For purposes of paragraph (1) of the definition of “Subpart C service revenue” of this section, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining such revenue, not to exceed 15%.

(5) In the case of a mixed service bundle, the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the definition of “Subpart C service revenue” of this section shall be the greater of—

(i) The revenue recognized from end users for the mixed service bundle less the standalone published price for end users for each of the non-music product or non-music service components of the bundle; provided that, if there is no such standalone published price for a non-music component of the bundle, then the average standalone published price for end users for the most closely comparable non-music product or non-music service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and

(ii) Either—

(A) In the case of a mixed service bundle that either has 750,000 subscribers or other registered users, or is reasonably expected to have 750,000 subscribers or other registered users within 1 year after commencement of the mixed service bundle, 40% of

the standalone published price of the licensed music component of the bundle (i.e., the permanent digital downloads, ringtones, locker service or limited offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for end users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and further provided that in any case in which royalties were paid based on this paragraph due to a reasonable expectation of reaching 750,000 subscribers or other registered users within 1 year after commencement of the mixed service bundle and that does not actually happen, applicable payments shall, in the accounting period next following the end of such 1-year period, retroactively be adjusted as if paragraph (5)(ii)(B) of the definition of “Subpart C service revenue” of this section applied; or

(B) Otherwise, 50% of the standalone published price of the licensed music component of the bundle (i.e., the permanent digital downloads, ringtones, locker service or limited offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for end users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.

(6) In the case of a music bundle containing a physical phonorecord, where the music bundle is distributed by a record company for resale and the record company is the compulsory licensee—

(i) Service revenue shall be 150% of the record company's wholesale revenue from the music bundle; and

(ii) The times at which distribution and revenue recognition are deemed to occur shall be in accordance with § 201.19 of this title.

Subscription service means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in § 385.24.

§ 385.22 Calculation of royalty payments in general.

(a) *Applicable royalty.* Licensees that make or authorize licensed subpart C activity, as defined in § 385.21, pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty rates and subscriber-based royalty floors for specific types of services provided in § 385.23, except as provided for certain free trial periods in § 385.24.

(b) *Rate calculation methodology.* Royalty payments for licensed subpart C activity, as defined in § 385.21, shall be calculated as provided in this paragraph (b). If a service provides different subpart C offerings, as defined in § 385.21, royalties must be separately calculated with respect to each such subpart C offering, as defined in § 385.21, taking into consideration service revenue and expenses associated with such offering.

Uses subject to the free trial royalty rate shall be excluded from the calculation of royalties due, as further described in this section and § 385.23.

(1) *Step 1*: Calculate the All-In Royalty for the Subpart C Offering, as Defined in § 385.21. For each accounting period, the all-in royalty for each subpart C offering, as defined in § 385.21, of the service provider is the greater of:

(i) The applicable percentage of subpart C service revenue, as defined in § 385.21, associated with the relevant offering as set forth in § 385.23(a) (excluding any subpart C service revenue, as defined in § 385.21, derived solely from licensed subpart C activity, as defined in § 385.21, uses subject to the free trial royalty rate); and

(ii) The minimum specified in § 385.23(a) for the subpart C offering, as defined in § 385.21, involved.

(2) *Step 2*: Subtract applicable performance royalties to determine the payable royalty pool, which is the amount payable for the reproduction and distribution of all musical works used by the service provider by virtue of its licensed subpart C activity, as defined in § 385.21, for a particular subpart C offering, as defined in § 385.21, during the accounting period. From the amount determined in step 1 in paragraph (b)(1) of this section, for each subpart C offering, as defined in § 385.21, of the service provider, subtract the total amount of royalties for public performance of musical works that has been or will be expensed pursuant to public performance licenses in connection with uses of musical works through such subpart C offering, as defined in § 385.21, during the accounting period that constitute licensed subpart C activity, as defined in § 385.21, (other than licensed subpart C activity, as defined in § 385.21, subject to the free trial royalty rate), or in connection with previewing of such subpart C offering, as defined in §

385.21, during the accounting period. Although this amount may be the total of the payments with respect to the service for that subpart C offering, as defined in § 385.21, for the accounting period, it will be less than the total of such public performance payments if the service is also engaging in public performance of musical works that does not constitute licensed subpart C activity, as defined in § 385.21, or previewing of such licensed subpart C activity, as defined in § 385.21. In the case where the service is also engaging in the public performance of musical works that does not constitute licensed subpart C activity, as defined in § 385.21, the amount to be subtracted for public performance payments shall be the amount of such payments allocable to licensed subpart C activity, as defined in § 385.21, uses (other than free trial royalty rate uses), and previewing of such uses, in connection with the relevant subpart C offering, as defined in § 385.21, as determined in relation to all uses of musical works for which the public performance payments are made for the accounting period. Such allocation shall be made on the basis of plays of musical works or, where per-play information is unavailable due to bona fide technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 3 in paragraph (b)(3) of this section.

(3) *Step 3: Calculate the Per-Work Royalty Allocation for Each Relevant Work.* This is the amount payable for the reproduction and distribution of each musical work used by the service provider by virtue of its licensed subpart C activity, as defined in § 385.21, through a particular subpart C offering, as defined in § 385.21, during the accounting period. To determine this amount, the result determined in step 2 in paragraph (b)(2) of this section must be allocated to each musical work used through the

subpart C offering, as defined in § 385.21. The allocation shall be accomplished as follows:

(i) In the case of limited offerings (but not limited offerings that are part of mixed service bundles), by dividing the payable royalty pool determined in step 2 in paragraph (b)(2) of this section for such offering by the total number of plays of all musical works through such offering during the accounting period (other than free trial royalty rate plays) to yield a per-play allocation, and multiplying that result by the number of plays of each musical work (other than free trial royalty rate plays) through the offering during the accounting period. For purposes of determining the per-work royalty allocation in all calculations under this step 3 only (i.e., after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each play shall be counted as provided in paragraph (c) of this section.

Notwithstanding the foregoing, if the service provider is not capable of tracking play information due to bona fide limitations of the available technology for services of that nature or of devices usable with the service, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used by the service provider for making royalty payment allocations for the use of individual sound recordings.

(ii) In the case of mixed service bundles and locker services, by—

(A) Determining a constructive number of plays of all licensed musical works that is the sum of the total number of interactive streams of all licensed musical works made through such offering during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of all licensed

musical works made through such offering during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of all licensed musical works made through such offering during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads);

(B) Determining a constructive per-play allocation that is the payable royalty pool determined in step 2 of paragraph (b)(2) of this section for such offering divided by the constructive number of plays of all licensed musical works determined in paragraph (b)(3)(ii)(A) of this section;

(C) For each licensed musical work, determining a constructive number of plays of that musical work that is the sum of the total number of interactive streams of such licensed musical work made through such offering during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of such licensed musical work made through such offering during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of such licensed musical work made through such offering during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads); and

(D) For each licensed musical work, determining the per-work royalty allocation by multiplying the constructive per-play allocation determined in paragraph (b)(3)(ii)(B) of this section by the constructive number of plays of that musical work determined in paragraph (b)(3)(ii)(C) of this section.

(E) Notwithstanding the foregoing, if a service provider offers both a paid locker service and a purchased content locker service, and with respect to the purchased content locker service there is no subpart C service revenue, as defined in § 385.21, and the applicable subminimum is zero dollars, then the service provider shall be permitted to include within the calculation of constructive plays under paragraphs (b)(3)(ii)(A) and (C) of this section for the paid locker service, the licensed subpart C activity, as defined in § 385.21, made through the purchased content locker service (i.e., the total number of interactive streams of all licensed musical works made through the purchased content locker service during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of all licensed musical works made through the purchased content locker service during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of all licensed musical works made through the purchased content locker service during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads)); provided that the relevant licensed subpart C activity, as defined in § 385.21, made through the purchased content locker service is similarly included within the play calculation for the paid locker service for the corresponding sound recording rights.

(iii) In the case of music bundles, by—

(A) Allocating the payable royalty pool determined in step 2 of paragraph (b)(2) of this section to separate pools for each type of product configuration included in the music bundle (e.g., CD, permanent digital download, ringtone) in accordance with the

ratios that the standalone published prices of the products that are included in the music bundle bear to each other; provided that, if there is no such standalone published price for such a product, then the average standalone published price for end users for the most closely comparable product in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and

(B) Allocating the product configuration pools determined in paragraph (b)(3)(iii)(A) of this section to individual musical works by dividing each such pool by the total number of sound recordings of musical works included in products of that configuration in the music bundle.

(c) *Overtime adjustment.* For purposes of the calculations in step 3 of paragraph (b)(3)(i) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of plays as follows:

(1) 5:01 to 6:00 minutes—Each play = 1.2 plays

(2) 6:01 to 7:00 minutes—Each play = 1.4 plays

(3) 7:01 to 8:00 minutes—Each play = 1.6 plays

(4) 8:01 to 9:00 minutes—Each play = 1.8 plays

(5) 9:01 to 10:00 minutes—Each play = 2.0 plays

(6) For playing times of greater than 10 minutes, continue to add .2 plays for each additional minute or fraction thereof.

§ 385.23 Royalty rates and subscriber-based royalty floors for specific types of services.

(a) *In general.* The following royalty rates and subscriber-based royalty floors shall apply to the following types of licensed subpart C activity, as defined in § 385.21:

(1) *Mixed service bundle.* In the case of a mixed service bundle, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 11.35%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%.

(2) *Music bundle.* In the case of a music bundle, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 11.35%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) and (3) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%.

(3) *Limited offering.* In the case of a limited offering, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 10.5%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the greater of—

(i) The appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%; and

(ii) The aggregate amount of 18 cents per subscriber per month.

(4) *Paid locker service.* In the case of a paid locker service, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of §

385.22(b)(1)(i) is 12%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the greater of—

(i) The appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.11%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 20.65%; and

(ii) The aggregate amount of 17 cents per subscriber per month.

(5) *Purchased content locker service.* In the case of a purchased content locker service, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 12%. For the avoidance of doubt, paragraph (1)(i) of the definition of “Subpart C service revenue,” as defined in § 385.21, shall not apply. The minimum for use in step 1 in § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 18%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 22%, except that for purposes of paragraph (b) of this section the applicable consideration expended by the service for the relevant rights shall consist only of applicable consideration expended by the service, if any, that is incremental to the applicable consideration expended for the rights to make the relevant permanent digital downloads and ringtones.

(b) *Computation of subminima.* For purposes of paragraph (a) of this section, the subminimum for an accounting period is the aggregate of the following with respect to all sound recordings of musical works used in the relevant subpart C offering, as defined in § 385.21, of the service provider during the accounting period—

(1) Except as provided in paragraph (b)(3) of this section, in cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to engage in licensed subpart C activity, as defined in § 385.21, with respect to a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, the appropriate all-in percentage from paragraph (a) of this section of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to engage in licensed subpart C activity, as defined in § 385.21, with respect to a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, the appropriate sound recording-only percentage from paragraph (a) of this section of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(3) In the case of a music bundle containing a physical phonorecord, where the music bundle is distributed by a record company for resale and the record company is the compulsory licensee, the appropriate all-in percentage from paragraph (a) of this section of the record company's total wholesale revenue from the music bundle in accordance with GAAP for the accounting period, which amount shall equal the applicable

consideration for such music bundle at the time such applicable consideration is properly recognized as revenue under GAAP, subject to the provisions of § 201.19 of this title concerning the times at which distribution and revenue recognition are deemed to occur.

(4) If a record company providing sound recording rights to the service provider for a licensed subpart C activity, as defined in § 385.21—

(i) Recognizes revenue (in accordance with GAAP, and including for the avoidance of doubt all applicable consideration with respect to such rights for the accounting period, regardless of the form or timing of payment) from a person or entity other than the service provider providing the licensed subpart C activity, as defined in § 385.21, and its affiliates, and

(ii) Such revenue is received, in the context of the transactions involved, as applicable consideration for such rights,

(iii) Then such revenue shall be added to the amounts expensed by the service provider solely for purposes of paragraph (b)(1) or (2) of this section, as applicable, if not already included in such expensed amounts. Where the service provider is the licensee, if the service provider provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service provider hereunder as a result of revenue recognized from a person or entity other than the service provider as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service provider to calculate the additional royalties and indemnify the service provider for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not

affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.

(c) *Computation of subscriber-based royalty rates.* For purposes of paragraphs (a)(3) and (4) of this section, to determine the subscriber-based minimum applicable to any particular subpart C offering, as defined in § 385.21, the total number of subscriber-months for the accounting period shall be calculated, taking into account all end users who were subscribers for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the free trial royalty rate as described in § 385.24. The product of the total number of subscriber-months for the accounting period and the specified number of cents per subscriber shall be used as the subscriber-based component of the minimum for the accounting period.

§ 385.24 Free trial periods.

(a) *General provisions.* This section establishes a royalty rate of zero in the case of certain free trial periods for mixed service bundles, paid locker services and limited offerings under a license pursuant to 17 U.S.C. 115. Subject to the requirements of 17 U.S.C. 115 and the additional provisions of paragraphs (b) through (e) of this section, the free trial royalty rate shall apply to a musical work when a record company transmits or authorizes the transmission, as part of a mixed service bundle, paid locker service or limited offering, of a sound recording that embodies such musical work, only if—

(1) The primary purpose of the record company in providing or authorizing the free trial period is to promote the applicable subpart C offering, as defined in § 385.21;

(2) No applicable consideration for making or authorizing the transmissions is received by the record company, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration used to promote the sale or paid use of sound recordings or audiovisual works embodying musical works or the paid use of music services through which sound recordings or audiovisual works embodying musical works are available;

(3) The free trial period does not exceed 30 consecutive days per subscriber per two-year period;

(4) In connection with authorizing the transmissions, the record company has obtained from the service provider it authorizes a written representation that—

(i) The service provider agrees to maintain for a period of no less than 5 years from the end of each relevant accounting period complete and accurate records of the relevant authorization, and identifying each sound recording of a musical work made available through the free trial period, the licensed subpart C activity, as defined in § 385.21, involved, and the number of plays or downloads, as applicable, of such recording;

(ii) The service is in all material respects operating with appropriate license authority with respect to the musical works it is using; and

(iii) The representation is signed by a person authorized to make the representation on behalf of the service provider;

(5) Upon receipt by the record company of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular service is in a material manner operating without appropriate license authority

from such copyright owner, the record company shall within 5 business days withdraw by written notice its authorization of such uses of such copyright owner's musical works under the free trial royalty rate by that service;

(6) The free trial period is offered free of any charge to the end user; and

(7) End users are periodically offered an opportunity to subscribe to the service during such free trial period.

(b) *Recordkeeping by record companies.* To rely upon the free trial royalty rate for a free trial period, a record company making or authorizing the free trial period shall keep complete and accurate contemporaneous written records of the contractual terms that bear upon the free trial period; and further provided that, if the record company itself is conducting the free trial period, it shall also maintain any additional records described in paragraph (a)(4)(i) of this section. The records required by this paragraph (b) shall be maintained for no less time than the record company maintains records of usage of royalty-bearing uses involving the same type of licensed subpart C activity, as defined in § 385.21, in the ordinary course of business, but in no event for less than 5 years from the conclusion of the licensed subpart C activity, as defined in § 385.21, to which they pertain. If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under this paragraph (b) with respect to a specific free trial period, the record company shall provide complete and accurate documentation within 10 business days, except for any information required under paragraph (a)(4)(i) of this section, which shall be provided within 20 business days, and provided that if the copyright owner or agent requests information concerning a large volume of free trial periods or sound recordings, the record company shall have a reasonable time, in view of

the amount of information requested, to respond to any request of such copyright owner or agent. If the record company does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the free trial royalty rate and the record company (but not any third-party service it has authorized) shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(c) *Recordkeeping by services.* If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under paragraph (a)(4)(i) of this section by a service authorized by a record company with respect to a specific promotion, the service provider shall provide complete and accurate documentation within 20 business days, provided that if the copyright owner or agent requests information concerning a large volume of free trial periods or sound recordings, the service provider shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the service provider does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the free trial royalty rate and the service provider (but not the record company) will be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(d) *Interpretation.* The free trial royalty rate is exclusively for audio-only licensed subpart C activity, as defined in § 385.21, involving musical works subject to licensing under 17 U.S.C. 115. The free trial royalty rate does not apply to any other use under 17 U.S.C. 115; nor does it apply to public performances, audiovisual works, lyrics or other uses outside the scope of 17 U.S.C. 115. Without limitation, uses subject to licensing under 17 U.S.C. 115 that do not qualify for the free trial royalty rate (including without limitation licensed subpart C activity, as defined in § 385.21, beyond the time limitations applicable to the free trial royalty rate) require payment of applicable royalties. This section is based on an understanding of industry practices and market conditions at the time of its development, among other things. The terms of this section shall be subject to de novo review and consideration (or elimination altogether) in future proceedings before the Copyright Royalty Judges. Nothing in this section shall be interpreted or construed in such a manner as to nullify or diminish any limitation, requirement or obligation of 17 U.S.C. 115 or other protection for musical works afforded by the Copyright Act, 17 U.S.C. 101, *et seq.*

§ 385.25 Reproduction and distribution rights covered.

A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed subpart C activity, as defined in § 385.21, solely for the purpose of providing such licensed subpart C activity, as defined in § 385.21 (and no other purpose).

§ 385.26 Effect of rates.

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.

Dated: August 21, 2013

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

Approved by:

James H. Billington,
Librarian of Congress.

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